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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ZAVALA,

Defendant and Appellant.

F053850

(Super. Ct. No. 07CM0126)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Tara K. Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Wiseman, J. and Kane, J.

STATEMENT OF THE CASE

On January 16, 2007, the Kings County District Attorney filed a complaint in superior court charging appellant Jesus Zavala as follows:

Count 1—discharge of a firearm at an inhabited dwelling (Pen. Code, §§ 246, 1203.095);

Count 2—attempted murder (Pen. Code, §§ 186.22, subd. (b)(4), 187, subd. (a), 664) with personal and intentional discharge of a firearm (§§ 12022.53, subds. (c), (d), (e)(1)) and personal use of a firearm by a principal (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (e)(1)) ;

Count 3—assault with a firearm (Pen. Code, § 245, subd. (a)(2)) with personal use of a firearm (§§ 667.5, subd. (c), 1192.7, subd. (c), 12022.5);

Count 4—possession of methamphetamine for sale (Health & Saf. Code, § 11378) while personally armed with a firearm (Pen. Code, § 12022, subd. (c)); and

Count 5—being an ex-felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

As to counts 2 and 3, the district attorney specially alleged appellant personally used a firearm (Pen. Code, §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8), 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)).

As to counts 3 through 5, the district attorney specially alleged the offenses were committed to promote criminal conduct by a criminal street gang (§ 186.22, subd. (b)(1)).

On January 16 and 18, 2007, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegations of the complaint.

On June 28, 2007, the date set for pretrial hearing, appellant entered into a plea agreement with the prosecution. Appellant agreed to plead no contest to counts 3 and 4, to admit the great bodily injury and gang enhancements as to count 3, and to admit his

prior felony conviction for a total term of 20 years 4 months.¹ To that end, the court on motion of the district attorney amended counts 3 and 4 to include the special allegation of a strike prior (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subd. (a)). The court dismissed the remaining counts and special allegations on motion of the district attorney.

On July 26, 2007, the court denied appellant probation and sentenced him to a total term of 20 years 4 months in state prison. The court imposed the doubled middle term of six years on count 3, a consecutive three-year great bodily injury enhancement and 10-year great bodily injury enhancement as to count 3, and a consecutive term of 16 months (one-third of the middle term, doubled) on count 4. The court awarded 221 days of custody credits, imposed a \$4,000 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (Pen. Code, § 1202.45), and directed appellant to provide samples of fingerprints and bodily fluids (Pen. Code, § 296, subd. (a)(1)).

On that same date, the court found appellant in violation of parole in an unrelated case, No. 06CM1929, and sentenced him to state prison for a concurrent term of three years with 319 days of custody credits. As to that case, the court imposed a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and suspended a second such fine pending successful completion of parole (Pen. Code, § 1202.45), and ordered appellant to supply samples of bodily prints and fluids (Pen. Code, § 296, subd. (a)(1)).

On July 31, 2007, the court amended the minute order of the sentencing hearing to reflect imposition of a 10-year term for the gang enhancement as to count 3 (Pen. Code, § 186.22, subd. (b)(1)) and the doubled one-third of the middle term, i.e., 16 months, as to count 4 (Pen. Code, § 667, subds. (d), (e)).

¹ In their stipulation to the plea, the parties computed the total term as follows: a doubled middle term of six years on count 3, a term of three years for the great bodily injury enhancement, a term of 10 years on the gang enhancement, and a term of 16 months on count 4 (one-third of the middle term, doubled because of the strike prior).

On September 25, 2007, appellant filed a notice of appeal challenging the validity of his plea or admission but did not request a certificate of probable cause (Pen. Code, § 1237.5; Cal. Rules of Court, rule 8.304(b)).

STATEMENT OF FACTS

Deputy District Attorney Adam Nelson summarized the facts underlying the complaint at the June 28, 2007 change of plea hearing:

“... [T]he defendant is an active member of a criminal street gang, he’s a Sureno, he has a moniker of Slugger. The particular street gang is known as Vicky’s Town.

“On January 6th of 2007, he drove by a rival gang member’s house and shot that individual in the leg. In doing so, he inflicted great bodily injury on that individual. The victim’s name was Ricardo Uribe.

“Evidence would have shown that that shooting was done for the benefit of a criminal street gang of which the defendant is a member.

“On January 15th of 2007, a search warrant was served at the defendant’s house, and found there was a large quantity of methamphetamine, which witnesses would have testified, given the quantity, would have been possessed for purposes of sale. The defendant was aware of the methamphetamine, that it was illegal to possess that. And all these events occurred in Kings County.”

Appellant’s trial counsel, Melina Benninghoff, concurred in that recitation and the court accepted the recitation as a factual basis for appellant’s plea.

DISCUSSION

Appellant’s appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record, which raises no issues, and asks this court to independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter dated February 8, 2008, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. On March 7, 2008, appellant filed a letter brief stating:

“... I found a statement on [page 48 of the Clerk’s Transcript] that says that [I’m] an active gang member. Since 2006 I [have] never been a gang member [though] I [have] never been a gang member but they were trying to classify me as one. [E]ven when I got sentence[d] I was on protected custody[.] [A]s for my case I fe[e]l I [have] been rob[bed.] [M]y attorney never help[ed] me with anything explaining or nothing[.] She just want[ed] me to plea[d] guilty[.] [T]he day of my sentence I was going to take my plea back but she informe[d] me that she made an agreement with the DA that if I took the plea back I was going to get charge[d] for every single of one[.] She got me scare[d]. I wasn’t on my 5 sense[s] so I don’t even remember waiving my rights[.] [On page 34 of the Clerk’s Transcript] they are talking about a strike[.] I didn’t had no knowledge about me getting that strike on court[.] [At page 46 of the Clerk’s Transcript, line 3] the court is explaining the full waiver[.] Me and my attorney didn’t had a discussion about that matter[.] [At page 45 of the Clerk’s Transcript, lines 16 and 27] I or my attorney never explain[ed] that I could [have cleared] my 245(a) on trial[.] ... I [am] bringing up another issue of being discriminated because of the orig[i]n of my race. [At page 43 of the Clerk’s Transcript, line 3] why [does it have] to be specific that one ‘Immigration Consequences’ because [I’m] Mexican?”

The trial court pursuant to Penal Code section 1192.5 is obligated to determine whether there is a factual basis for a plea of guilty or no contest when that plea arises from a negotiated resolution of the charges. This can be done by having the defendant describe the conduct or answer questions, by detailing a factual basis, or by having defense counsel stipulate to a particular document such as the transcript of a preliminary hearing as providing a factual basis for a plea. The trial court need not obtain an element-by-element factual basis, but need only obtain a prima facie factual basis for the plea. (*People v. Marlin* (2004) 124 Cal.App.4th 559, 571-572.) The trial court properly met these requirements in the instant case.

As to the operability of the instant appeal, Penal Code section 1237.5 states:

“No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

“(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

“(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.”

California Rules of Court, rule 8.304(b) states in pertinent part:

“(b) Appeal after plea of guilty or nolo contendere or after admission of probation violation

“(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] ... [¶]

“(4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on:

“(A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or

“(B) Grounds that arose after entry of the plea and do not affect the plea’s validity.

“(5) If the defendant’s notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1).”

In determining whether Penal Code section 1237.5 applies, courts must look to the substance of the appeal. The crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made. A challenge to the validity of the plea renders the appeal subject to the requirements of Penal Code section 1237.5. (*People v. Corban* (2006) 138 Cal.App.4th 1111, 1116-1117.) A careful examination of appellant’s contention on appeal reveals he is attacking the validity of the no contest plea he entered on June 28, 2007. Because the appellant failed to adhere to the requirements for a certificate of probable cause, as set forth in Penal Code section 1237.5 and California

Rules of Court, rule 8.304(b), his attack on the validity of the plea is not reviewable on appeal. (*People v. Carr* (2006) 143 Cal.App.4th 786, 793-794.)

Our independent review discloses no other reasonably arguable appellate issues. “[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel’s professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment.” (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.